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Competition and Trade in the Post-Uruguay Round Period: the case of the Republic of Korea

Report prepared by

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1. The recent conclusion of the Uruguay Round will significantly alter the competitive conditions in both domestic and international markets. The purpose of this paper is to explore the competitive results of various Uruguay Round codes with respect to the Republic of Korea in terms of both its domestic and external trade, and to draw policy implications and proposals for action at the domestic and international level from a competition policy perspective.

2. After briefly describing the evolution and the present state of national competition policy, we will assess the possible effects of various contingent protection measures of the Uruguay Round on competition in the Republic of Korea (and by extension, in other developing countries) and world export markets. This will be followed by a discussion of competition policy issues posed by the new world trading system and recent developments in the competition policy of the Republic of Korea. The paper ends with a proposal for the next round of the World Trade Organization (WTO) and actions that UNCTAD and other multilateral organizations can take with the aim of including competition principles in the future international trading system.

I. KOREAN COMPETITION LAW AND POLICY

3. The Republic of Korea is one of the NICs that have successfully institutionalized its own competition law and policy. In December 1980, the Government enacted "the Monopoly Regulation and Fair Trade Act" (hereafter "the MRFTA"); it signified a fundamental shift in policy orientation, marking the beginning of a departure from the government-led economy which prevailed up to the 1970s, to a full-fledged market economy based on creative activities of the private sector and free competition. Since then, the Republic of Korea has actively launched a liberalization policy in various economic fields, expanding the scope of open trade and investment and promoting competition among domestic firms.

4. The MRFTA was amended in 1986, 1990, and 1992. The Korea Fair Trade Commission (hereafter "KFTC"), an administrative agency with quasi-judicial authority, has broad responsibilities to enforce the MRFTA which is ultimately enforced by the judicial system. There are five corrective measures which the KFTC may take against violations of the MRFTA. These include warning, recommendation for correction, order for correction, order to pay an administrative surcharge, and request for indictment. Anyone injured by a violation of the MRFTA is entitled to bring an action for the recovery of actual damages after corrective measures by the KFTC are finalized. Moreover, courts can impose criminal penalties on a violator who is indicted and convicted. Such sanctions range from a fine of up to 100 million won (approximately US$ 125,000), to a fine of up to 200 million won and/or imprisonment of up to three years depending on the nature of the violation.

A. The evolution of competition policy

5. The Republic of Korea enjoyed highly successful economic development during the past several decades under the direct supervision of the Government. Indeed, the Government took charge of the overall operation of the economy, regulating and directing a wide range of economic activities in an attempt to achieve rapid growth under such constraints as a small domestic market, lack of natural resources, and insufficient financial resources. The

Government's economic policies were generally focused on developing specific industrial sectors by providing direct assistance and protection to selected industries and firms, in order to make strategic use of available resources.

6. Although the government-driven development strategy often produced the desired outcome, it was invariably accompanied by adverse side-effects and market distortions which grew more serious as the economy expanded and became increasingly complex. Owing to industrial and banking policies that treated large firms favourably in order to realize scale economies, activities of small and medium-sized firms were stunted and economic power became concentrated. With conglomerates expanding and diversifying their business activities, the monopolistic structure of the market deepened and restrictive business practices became more common and widespread. The growth-first policy also widened imbalances among industries, regions, and income classes.

7. In the aftermath of the oil crisis from 1975 to 1979, the Government further tightened its grip on the economy by adopting widespread price controls. Hit by the first oil crisis, the country suffered heavily from a sharp increase in the price of imported raw materials, experiencing high rates of inflation and demand-supply imbalances in a large number of already distorted markets. In an effort to cope with this problem, the Act Concerning Price Stabilization and Fair Trade was enacted in 1975, and the Government monitored and intervened in individual product markets under this Act. Extensive price regulation of about 150 monopolistic or oligopolistic products was carried out annually until 1979. In addition, a price ceiling was imposed initially on coal briquettes, and then between 1977 and 1978, on more than 20 other items of daily necessity. 1/

8. Direct price controls on a wide range of commodities, however, went beyond the limits of administrative capacity and led to a series of problems and negative side-effects. Long lasting price controls severely hampered the price mechanism and gave rise to phenomena such as dual pricing and deterioration of product quality, as well as chronic excess demand. Most of the regulated firms lost interest in production expansion and capital investment, which weakened their ability to weather business cycles. Since prices intermittently climbed sharply in a "stop and go" pattern, neither producers nor consumers could have reasonable expectations about prices or plan their activities rationally. This experience, coupled with the aftermath of the second oil crisis, prompted a reappraisal of the past performance of the national economy and led to the general consensus that the economy should be run by the unfettered functioning of the market mechanism in the coming decades. As a first major step in this direction, the MRFTA was enacted at the end of 1980, nullifying direct price regulation under the Price Stabilization Act and setting the comprehensive new "rules of the game" for the market economy, namely, free and fair competition.

9. Two important issues arose while the MRFTA was being drafted. First, the general principle of letting the market mechanism determine prices could not be upheld unless the market structure was competitive. Since the majority of product markets in the Republic of Korea were monopolistic or oligopolistic, and price stabilization was regarded as the economic goal of the first order, the MRFTA eventually specified the prohibition of undue pricing activities by market-dominating firms and of parallel price increases by oligopolists. 2/

10. The second issue was over whether to use the MRFTA as legal justification for a direct attack on the concentration of economic power, embodied and symbolized by the jaebol. 3/ Despite many divergent opinions on this issue, most believed that the jaebol issue needed to be addressed. This was expressed in Article 1 of the Act, which identifies the prevention of "excessive concentration of economic power" as one of the law's purposes. Nevertheless, the MRFTA stopped at regulating business integration which would cause "substantial injury to competition". Furthermore, the Guidelines for Business Integration dealt only with horizontal and vertical integration, omitting conglomerate integration, the most powerful means for the expansion of business groups. The concentration of corporate ownership, another facet of economic power, was also left intact. These omissions of the MRFTA were partially addressed by amendments in 1986 and 1990.

B. Substantive provisions of the MRFTA and their application

11. The MRFTA's aim according to Article 1 is to encourage free and fair competition and thereby stimulate creative business activities and protect consumers, as well as promote balanced development of the national economy by prohibiting the abuse of market-dominating positions, excessive concentration of economic power, and unfair business practices. The statute is applicable to the industries that are specifically listed in Article 2, which include almost all industries except agriculture, fisheries and mining. Activities pursuant to other laws and certain activities carried out by trade associations established for the purpose of mutual support among small businesses or consumers are exempted from application of the MRFTA.

12. The MRFTA was most recently revised in December 1992. This amendment introduced limitations on cross debt guarantees between affiliated companies of conglomerate business groups, exceptions to previous limitations on the amount of total investment in other companies by these business groups, and administrative surcharges on unfair business practices. The Enforcement Decree of the MRFTA was correspondingly revised in February 1993 to limit the number of business groups subject to limitations on total investment amounts and debt guarantees to the 30 largest ones according to asset size. It also raised the standard for designating markets featuring market-dominating enterprises from annual sales of more than 30 billion won to sales of more than 50 billion won. Substantive provisions of the MRFTA can be categorized into eight parts.

13. Article 3 of the MRFTA prohibits a market-dominating firm from unreasonably setting prices, restraining output, hindering new entry, eliminating a competitor, or otherwise restricting competition. Market-dominating firms are annually designated by the KFTC in accordance with the following criteria: either the market share of the largest firm is greater than 50 per cent (monopoly) or the combined share of the top three firms is greater than 75 per cent (duopoly and oligopoly) in a market with total domestic sales totalling more than 50 billion won. In 1993, 335 firms in 140 markets were designated as market-dominating firms, and orders for correction of abusive practices were issued in two cases.

14. Article 7 prohibits firms with equity capital of more than 5 billion won or total assets of more than 20 billion won from combining with other firms through stock holdings, interlocking directorates, mergers, asset transfers,

or the establishment of new companies, 4/ if such combinations are likely to cause substantial injury to competition in any line of commerce. Exemptions may be granted by the KFTC where business integration is necessary to rationalize an industry or strengthen its international competitiveness. Proposed mergers and asset purchases, as well as the establishment of new companies, must be reported to the KFTC prior to the transaction, and acquisitions of more than 20 per cent of a company's stock and interlocking directorates must be reported to the KFTC within 30 days after their completion. Business combinations not required to file notification are effectively exempt from merger control. A total of 2,429 business integrations were reported during the period of 1981 to 1993, and in only two cases was substantial injury to competition declared. 5/ While more than half of the reported cases were examples of conglomerate integration, they were not controlled. A revision of the Guidelines for Business Integration including such cases is being considered.

15. Articles 8 through 11 of the MRFTA, which were introduced in 1986 and strengthened in 1989, provide for specific measures designed to restrain excessive expansion of conglomerate business groups and thereby mitigate the concentration of economic power. Article 8 forbids the establishment of a holding company, and Article 9 prohibits a company of a conglomerate from acquiring or owning the stock of an affiliated company which owns the said company's stock. Article 10 stipulates that an affiliated company of a large business group may neither obtain nor hold shares of other domestic firms in excess of 40 per cent of its net assets. But investments necessary for enhancing international competitiveness, such as investments for technology development, are exempted from this restriction by the 1992 amendment. Article 10 (2), which was also added in the 1992 amendment, sets forth the restrictions on debt guarantees between affiliated companies. Effective 1 April 1993, the total amount of debt guarantee that a firm provides for its affiliated companies may not exceed 200 per cent of its own capital. The large business groups subject to this regulation have a three-year grace period to reduce debt guarantees that exceed the limit. Article 11 restricts stock voting rights of banking and insurance companies affiliated with a conglomerate business group.

16. These provisions apply to 30 largest business groups that the KFTC designate annually according to total assets. The KFTC now intends to take into consideration such factors as the number of affiliated companies and the extent of ownership distribution in addition to total assets in designating large business groups. It also plans to include government-invested corporations that were previously excluded from being designated as large business groups. From 1987 to 1993, orders for correction have been issued in 30 cases and recommendations for correction in 8 cases.

17. Undue concerted activities among competitors which would substantially restrain competition in any line of commerce are prohibited under Article 19. Prohibited activities include collusive agreements on prices and other sales conditions, outputs, customers and market areas, production capacity, specialization, and joint operating agencies. An express agreement is not required to establish a violation of the provision; the existence of a restrictive agreement can be inferred from parallel behaviour in appropriate circumstances. The KFTC may impose an administrative surcharge on colluding firms to a value not exceeding 1 per cent of the total sale of the product

during the period in which the cartel was effectively maintained. By 1993, 95 undue collective activities were remedied, and about half of them involved price fixing.

18. Parties to a restrictive agreement may apply to the KFTC for prior approval of the agreement, and the KFTC can grant exemption if the proposed concerted activities are deemed necessary for the purpose of rationalizing a specific industry, overcoming cyclical recessions, facilitating industrial restructuring, enhancing the competitive viability of small and medium-sized firms, promoting research and development, or rationalizing terms of transactions. Offering discretionary exemptions to restrictive agreements can be regarded as a strong form of rule of reason treatment and is practised primarily where the law accommodates goals other than the maintenance of competition. As of the end of 1993, only five exempted cartels were in existence.

19. Article 23 declares six kinds of business practices as unfair, and Article 29 forbids resale price maintenance except for publications covered by the Copyright Act and goods approved by the KFTC. The KFTC has issued several public notices specifying the types of business practices which are unfair and therefore subject to prohibition. The public notices currently in force are "Public Notice on Designation of General Unfair Business Practices", "Specific Unfair Business Practices in the Department Store Business", "Marking of Suppliers for Gas Stations", "Public Notice on Discount Sales", and "Types and Standards of Unfair Business Practices Concerning the Provision of Promotional Gifts". Whereas vertical price restraints have consistently been treated as illegal per se, non-price vertical restraints have been judged under the rule of reason since 1992.

20. The KFTC has been very active in enforcing Articles 23 and 29. During the 1981-1993 period, it issued corrective orders in 714 cases and corrective recommendations in 550 cases for engagement in unfair busines practices. Of these, there were 98 cases of resale price maintenance, 329 cases of false or misleading advertising, 32 cases of refusal to deal, 97 cases of exclusive dealing or territorial restriction, 116 cases of tying, price discrimination, boycotting, or other unfair practices, 260 cases of offering excessive promotional gifts, and 244 cases of undue or deceptive discount sales.

21. Article 26 extends prohibitions on undue concerted activities and unfair business practices to trade associations and their members. In addition, it prohibits trade associations from limiting the number of firms and unreasonably restricting the business activities of member firms. As of the end of 1993, there were 1,571 trade associations, a sharp increase from 467 in 1970, and trade associations were engaged rather extensively in various types of anticompetitive or unfair business practices. In the 1981-1993 period, a total of 123 correction orders and 31 correction recommendations were issued against trade associations.

22. Article 32 prohibits individual firms and trade associations from entering into international contracts that contain undue concerted activities, unfair trade practices or resale price maintenance. The KFTC has issued public notices describing the types of potentially anticompetitive or unfair business practices in international contracts. Parties to a technology licensing, distributorship, or copyright inducement contract (excluding

contracts on books, records and films) where the contract meets specified duration and royalty standards are subject to the notification requirement. If anti-competitive or unfair contractual provisions are discovered, the KFTC initially advises the parties to modify such provisions and may order modification or cancellation if the parties do not comply. This is only the case, however, provided that the KFTC has sufficient reason to believe that the negative impact of such provisions would be substantial.

23. Article 63 of the MRFTA stipulates that central administrative authorities are required to consult with the KFTC before they enact, amend, or issue a law, decree, or administrative measure that is likely to restrain competition. Competition-restraining laws and regulations are those that give rise to undue collaborative activities or restrict the number of business concerns in a specific sector. This provision serves as a major vehicle for the KFTC in preventing the promulgation of new regulations that unreasonably suppress competition and advocating competition principles in the government rule-making process. During the 1981-1993 period, there were 897 cases of consultation, of which 196 were rectified.

II. COMPETITIVE EFFECTS OF THE URUGUAY ROUND

24. Doing business in today's world economy is becoming increasingly global. Firms are using new combinations of trade, investment, and collaborative arrangements to expand internationally, enter new markets, and exploit technological and organizational advantages as widely as possible, and these new patterns of firms' activities involve ever-increasing international flows of goods, services, investment, technology, and people.

25. The recent conclusion of the Uruguay Round trade negotiations reflects a willingness to adjust the multilateral trading system to these new realities of doing business globally. In particular, it has broken new ground in the three areas of services, investment, and intellectual property, all of which profoundly affect the competitive viability of firms in world markets. The chief merit of the GATT and the TRIMs agreements lies in the placement of services and investment-related rule-making under the purview of the multilateral trading system, thereby providing a basis for further liberalization. The TRIPs agreement implicitly recognizes that the ability to make strategic use of intellectual property rights is an important factor affecting trade and investment decisions which are of paramount importance to global firms. Thus its aim is to address problems linked to inadequate patent, copyright, and trademark regimes, which have been a growing source of international friction. This significantly enhances the protection afforded to firms investing, producing, and trading in R & D-intensive goods and services.

26. Although substantial progress has been made in strengthening intellectual property protection and reducing the height of "traditional" trade barriers, significant impediments to doing business remain across a wide range of products and countries. Of particular concern to many developing countries is that the Antidumping Code, Agreement on Subsidies and Countervailing Measures, and Agreement on Safeguards all fall short of addressing significant anticompetitive aspects of contingent protection measures.

27. Trade law remedies have been increasingly imposed by the authorities in the United States, the European Union, Canada and Australia on the Republic of Korea's major export items, including electronics, steel products, chemicals, plastics, textiles, albums, and footwear. Antidumping measures are the most frequently used means of restricting competition from the Republic of Korea's exporters. In 1992, for instance, antidumping measures were taken in 37 cases against 32 items, while safeguards were invoked in 14 cases, and countervailing duties in one case. There has also been strong political pressure on the Government of the Republic of Korea to implement "voluntary export restraints" (VERs) in order to restrain its exports. In response to such demands, the Government of the Republic of Korea has imposed VERs in areas such as electronics, automobiles, steel, textiles, and others. In 1992, about 15 per cent of the Republic of Korea's export trade with developed countries was covered by contingent protection measures and other restrictive agreements; the relative importance of those products subject to trade law remedies in export to developed countries has been declining over the past five years.

28. An important issue regarding various trade law remedies is that of thresholds - the degree of import penetration below which restrictive action should not be taken, the margin of dumping or of subsidization below which no action should be taken, and the minimum impact below which no action should be taken. GATT Articles VI (antidumping and countervailing duty) and XIX (protection against intolerable increases of imports of particular products) are exceptions to the general rules and should be interpreted as such. A raising of the thresholds for trade law remedies would help to ensure that contingent protection measures will only be taken when the quantities involved are relatively substantial.

29. The new *de minimis* margin of dumping agreed to in the Uruguay Round is 2 per cent (expressed as a percentage of the export price), below which antidumping duties shall not be imposed. When compared with the current non-codified practice of various countries, however, the 2 per cent standard does not appear to offer any improvement from the viewpoint of exporting countries. A change in United States law will be required to raise the existing 0.5 per cent *de minimis* standard to 2 per cent, but it is unlikely that this will have a meaningful impact on the vast majority of United States cases in practical terms. Some United States experts have argued that the *de minimis* dumping margin, for example, should be 5 per cent. 6/ Moreover, it is established practice in the European Union and Canada to consider dumping margins of less than 1.5 per cent to be *de minimis*. While Australia does not have a formal *de minimis* margin rule, in one case the Australian authorities referred to 5 per cent margin as "quite insignificant", and in another case they referred to a 6.25 per cent margin as "so small". Duties were not imposed in either case.

30. The *de minimis* market share under the antidumping provisions is 3 per cent. That is, the volume of dumped exports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of the imports of the like product in the importing country unless countries which individually account for less than 3 per cent of the imports collectively account for more than 7 per cent of the imports. These figures are no higher than those applied by some countries, and lower than those applied by others. The

inclusion of a *de minimis* market share provision, therefore, will not result in a substantial departure from current practice, and may actually be a step back from the perspective of exporting countries. In fact, it has been normal practice in the United States, the European Union, Canada, and Australia to consider imports to be "negligible" when they represent a limited share of the domestic market. The United States and the European Union generally dismiss cases on the basis of *de minimis* market share when imports account for less than 1 per cent of the domestic market. The Australian antidumping authorities have dismissed cases where imports accounted for as much as 10 per cent of the domestic market, stating that "[t]he Authority has difficulty in accepting that import penetration of such a magnitude was sufficient to cause material injury." It is more difficult to clearly discern the pattern used by Canada, although cases have been dismissed where imports accounted for as much as 4.6 per cent of the domestic market.

31. The *de minimis* subsidy provision sets the minimum level of 1 per cent ad valorem (2 per cent for developing countries). Again, an examination of current practice in countries levying countervailing duties suggests that this may be no great improvement. Indeed, some United States experts have argued for a 5 per cent *de minimis* level for domestic subsidies. 7/

32. Another systemic issue is the nature of causal links between disputed imports and observed adverse impact. Article VI of the GATT authorizes the use of offsetting duties when dumped or subsidized imports "cause or threaten material injury", and Article XIX refers to imports which "cause or threaten serious injury". A determination of injury for the purposes of Article VI is to be based on positive evidence and involve an objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers. There remains the likelihood that the causality between dumped imports and injury will be misdiagnosed, as injury caused by other factors can be attributed to the dumping at issue.

33. An investigation of any alleged dumping under Article VI shall be initiated if the application for it is supported by domestic producers whose collective output constitutes more than 50 per cent of the total production by that portion of the domestic industry expressing either support for or opposition to the application. No investigation can be initiated if domestic producers expressly supporting the application account for less than 25 per cent of total production. A troublesome factor in this process is that employees of domestic producers or representatives of those employees may make or support an application for an investigation. This gives rise to a serious concern that the antidumping system may be systematically abused by labour unions in an effort to secure their jobs.

34. It is agreed that any definitive antidumping duty (or price undertaking) shall be terminated on a date not later than five years from its imposition. There is some lingering doubt, however, that this will actually prevent the prolonged imposition of antidumping duties, since the antidumping authorities can review the need for their continued imposition by their own initiative or upon request by any interested party. Authorities may then decide to keep the protective measures in force if they determine that their expiration would probably lead to continuation or recurrence of dumping and injury.

35. It is widely agreed that a margin of dumping may have been artificially created under the antidumping system. If prices are fluctuating in the domestic market, the "normal price" calculated by the use of averages in the domestic market of the exporter will be higher than some prices in individual export transactions, even if the export transactions precisely mirror the domestic sales; thus an artificial margin of dumping will come into existence. Problems also exist in the use of "cost of production" of the goods to determine "normal price" when there are not sufficient sales in the home market to calculate "normal value"; under the United States rules, it is provided that such "cost of production" must include an allowance for profit of not less than 8 per cent, regardless of the normal profits in the exporting industry, or the firm, or the industry in the importing country.

36. The danger of dumping margins being artificially created is somewhat reduced under the antidumping code of GATT 1994. Sales of the like product in the domestic market of the exporting country or to a third country at prices below per unit costs of production plus selling, general, and administrative costs, may be treated as being outside the ordinary course of trade by reason of price and thus disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time. Costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product.

III. NEW DIMENSIONS OF COMPETITION POLICY IN THE NEW WORLD TRADING SYSTEM

37. As traditional trade barriers are reduced and globalization progresses, markets tend to become more integrated and competition stiffer. Foreign competition serves as an expedient and efficient check on competitive abuses by domestic firms, especially for a small open economy where domestic markets are often highly concentrated. However, trade and investment liberalization together with the general trend of globalization pose significant competition-related issues. The growth of intra-firm and intra-network trade provides global firms with a wider range of opportunities to exert market power and engage in anticompetitive practices such as market sharing. The strategic use of intangible assets such as production technology and intellectual property rights may confer market power and can be used to monopolize markets by eliminating competitors. Mergers and acquisitions, which represent a primary means of securing market presence, may increase concentration and promote oligopoly and oligopsony. Multinational vertical linkages may effectively foreclose access to a market, and strategic alliances - especially in high-technology sectors - may also provide a vehicle for segmenting markets or achieving a dominant position.

38. While globalization and the positive outcome of the Uruguay Round trade negotiations are likely to bring about more intense competition, they will not necessarily ensure competitive market behaviour and efficient outcomes.

As firms attempt to improve or maintain their competitive position in an increasingly open environment, they may take actions designed to effectively block competing imports or foreign investors from their domestic market.

39. There are a number of ways to prevent or restrict competition from foreign rivals. A dominant firm or group of colluding firms may engage in exclusionary behaviour by practicing predatory pricing or boycotting distributors or suppliers who deal with foreign firms in order to fend off the efforts of new rivals trying to get into the market. Some forms of price discrimination, such as loyalty bonuses, rebates and discounts, may deter local purchasers from dealing with foreign firms. The trade associations may also be a matter for concern if they provide a forum for organizing industry cartels with exclusionary effects on foreign competitors or are used to discriminate against foreign-controlled domestic companies by limiting their rights to participate in association activities, thus impairing their ability to compete.

40. Vertical restraints may also serve as a vehicle for impeding the entry of foreign firms by foreclosing the market. If incumbent manufacturers have tied up all retailers, possibly through exclusive dealing arrangements or full vertical integration, a foreign entrant will have to overcome barriers erected by the larger amount of capital necessary to set up its own distribution networks, as well as the costs of learning effects resulting from the greater efficiency of established retailers over new ones. The minimum efficient scale of operation for distribution networks may be quite large, requiring the establishment of nationwide organizations. If a new entrant cannot get access to existing networks, it may be forced to not only set up its own network, but also attain the same scale in its manufacturing activities in order to be efficient. Both the necessary scale economies and capital requirements could be effective barriers against smaller enterprises seeking to enter new markets. Alternatively, a producer who controls major distribution channels may charge foreign rivals a higher price for access to the market, thus limiting their competitiveness.

41. Similarly, vertical arrangements may be used to secure control of an essential input, thus denying it to existing or potential rivals. These rivals would then have to set up or find alternative upstream sources, thus increasing the capital required and the risks involved in entering the market. Complete vertical integration may also create barriers and enhance market power if it prevents downstream entities from substituting lower cost alternatives to the upstream entity's product. If the lower cost alternative happens to be a foreign product, a market access problem may arise.

42. National competition laws and policies are intended to protect and preserve competitiveness and ensure efficient market outcomes, but they may not always be able to address effectively some of the problems depicted above. They may find it difficult to deal with transnational anticompetitive practices. The relevant conduct, transactions, entities, facts, and economic impact may well be spread worldwide, thereby giving rise to a number of jurisdictional problems. Various legal doctrines, including those of "effects" and "economic unity" have been devised to bridge these omissions. These are, however, far from being universally and uniformly accepted. Discovery and fact-finding also create substantial hurdles in investigations. Of course, a lenient competition policy which condones predatory or

exclusionary behaviour by domestic firms trying to keep foreign goods, services, or investment out may effectively serve as a substitute for more traditional forms of protection.

43. In both cases commercial frictions can arise and trade policy may be called upon to ensure "fair" trading conditions. This raises the "assignment" problem since trade policy instruments are often not well-suited to addressing competition-related issues. In fact, trade policy measures usually generate even greater distortions, when an antidumping system is captured by import-competing interests to both dampen the competitive edge of a rival trying to get into the market and foster collusive behaviour.

44. These issues and their underlying problems represent new dimensions of competition policy which have yet to elicit a coherent institutional response, and are reflected in efforts made at unilateral, bilateral, and regional levels to adapt national competition policies to a globalizing world economy. The United States Department of Justice in 1992 decided to assert antitrust jurisdiction over conduct occurring overseas that restrained United States exports, and recently reaffirmed that it would take a more active stance in countering harm to United States export commerce. Furthermore, various legislative proposals aimed at tackling market access issues by making it easier to use antitrust rules are pending before the United States Congress.

45. At the bilateral level, substantive competition issues have been discussed between the United States and Japan, first in the Structural Impediments Initiatives (SII) and more recently in the ongoing Framework talks. Since the 1980s, there has been growing demand by the United States Government that the Japanese Government take steps to open its domestic market to foreign products. Officials and business persons in the United States have stated that although formal trade barriers such as tariffs and import quotas were reduced, peculiar structural features in the Japanese market created market conditions which made access by outside parties extremely difficult. Such structural features included government regulations. However, the major issue in such structural factors is restrictive business practices engaged in by private enterprises, such as exclusive business customs, cross share holdings, and interlocking directorates among major companies. Dialogue for Economic Cooperation (DEC) between the Republic of Korea and the United States has been under way to discuss a number of trade-related aspects of the two countries' competition policies.

46. Several bilateral agreements have been concluded to enhance cooperation between competition authorities. An interesting new feature, called "positive comity", was included in the 1991 agreement between the United States and the European Community. This principle goes beyond the conciliation and cooperation approach provided for in the 1986 OECD Recommendation, in that it provides that a party which considers itself affected by an anticompetitive practice taking place in the territory of another party can call upon the latter to take enforcement actions provided for by its own laws.

IV. DEVELOPMENTS OF THE KOREAN COMPETITION POLICY

47. Since the enactment of the MRFTA, the Government of the Republic of Korea has been taking steps to transform the government-led economy to a full-fledged market economy based on free and fair competition. It initiated

trade and investment liberalization programmes in the early 1980s, and in the latter part of the 1980s, started to push forward more concrete plans for easing regulations in individual industrial sectors. When countries deregulate their economies, established firms may respond by trying to reduce competition. Therefore competition policies become more important as deregulation policies are implemented.

48. As markets become increasingly open and integrated through the success of multilateral negotiations like the Uruguay Round trade negotiations, new impediments and obstacles to competition, mainly of a private nature, have started to appear. Transnational firms trading in R & D-intensive goods may, for example, engage in anticompetitive abuses of intellectual property rights to monopolize or attempt to monopolize industries. Domestic companies in sectors where the market is highly concentrated or tightly organized may behave in a way that effectively impedes new competitors from entering the market. The interaction between foreign firms and the national systems in which they operate renders any marked divergence between systems, such as differences in competition rules, a potential source of friction.

49. All these factors call for, among other things, an even larger role for, and more extensive coverage of, competition policy, its transparent and non-discriminatory implementation, and a more integrated approach to competition issues. The KFTC has taken or plans to take several measures in these directions.

50. Recognizing that the current notification and review system for international contracts under the MRFTA could become a potential source of friction, the KFTC decided to modify the relevant provision. It will submit to the National Assembly a revised bill on the MRFTA that eliminates the pre-review process for international contracts so as to extend the principles of national treatment and non-discrimination to contracts involving foreign firms. Contracting parties will be able to request prior consultation with the KFTC to verify that their contracts do not violate the substantive law. Specific rules to be applied in judging international contracts will be developed and articulated in order to increase the transparency of the legal standards in this area.

51. Another, and probably more important, development of competition policy in the Republic of Korea is the gradual shift to rule-of-reason standards, away from the rigid per se standards previously used to judge vertical restraints. This shift also involves a more lenient treatment of premium offers and other methods of sales promotion. In July 1992, the KFTC issued a policy statement advising interested parties that territorial restrictions, unilateral refusals to deal, and quantity forcing would be evaluated according to rule-of-reason standards. The KFTC is now considering whether to expand the scope of rule of reason to include other non-price vertical restraints. Concurrently, the KFTC is utilizing with greater frequency administrative surcharges to deter firms from engaging in unfair or anticompetitive arrangements, and is emphasizing enforcement activities against unfair business practices by large business groups and major government-invested enterprises. The KFTC also plans to ease restrictions on premiums and other methods of sales promotion which might place new entrants at a disadvantage vis-à-vis established firms. The guidelines for Premiums will be revised to

raise the maximum possible level of premiums that can lawfully be offered to consumers, and Guidelines for Promotional Sales will be modified so as to give firms more flexibility in conducting such sales.

52. As the economy of the Republic of Korea is deregulated in a more open environment, it is expected that there will be an increasing tendency for competing firms to engage in collusive practices. The KFTC is particularly concerned about the role that trade associations play in communicating with government agencies, facilitating licenses, and obtaining information on internal regulations, and intends to use the MRFTA more aggressively to tackle collusive practices that exclude new entrants. Investigation of unfair or exclusionary practices by trade associations is currently under way as part of the administrative deregulation programme. More specifically, 68 trade associations are being investigated, and the results will be reported to the Administrative Deregulation Committee chaired by the Deputy Prime Minister. The KFTC, relying on the investigation results, will move to eradicate restrictive trade practices that suppress competition. In addition, the KFTC is trying to develop effective methods for detecting and preventing bid rigging on government contracts.

53. The MRFTA requires other administrative agencies to consult with the KFTC before they legislate or amend laws or administrative decrees that contain competition-restraining provisions. This competition advocacy programme, however, has not been implemented satisfactorily, mainly because the procedural requirements for prior consultation were not specified in detail. The KFTC is seeking to utilize actively the prior consultation clause by supplementing detailed rules of the consultative process through the revision of relevant laws.

54. To encourage corporations to develop MRFTA compliance programmes, the KFTC plans to consider a corporation's promulgation, dissemination, and good faith enforcement of an antitrust compliance programme in determining the corporate defendant's intent. Furthermore, it is considering a policy of lenient treatment for corporations or officers who voluntarily report their illegal activity prior to detection.

55. There remain a few more tasks for the Republic of Korea's future competition policy. First, the KFTC needs to intervene in sectors where the market is highly concentrated and organized in a way that effectively suppresses competition. So far, it has not been active in addressing monopolistic market structures and investigating industries where the KFTC itself has identified structural barriers. It is sometimes argued that a monopoly is necessary to obtain efficiency, whereas competition tends to be wasteful in the early stages of economic development. Although the logic of this argument may not be entirely denied, it should be noted that an "artificial" monopoly eventually hampers not only economic efficiency itself, but more importantly discourages the competitive spirit of society that is the real engine of economic growth.

56. Secondly, the KFTC needs to develop legal rules and standards for distinguishing anticompetitive abuses of intellectual property rights from legitimate uses of such rights. This is particularly important in light of the significantly enhanced protection afforded to firms investing and trading in R & D-intensive goods.

57. A third task is to coordinate competition policy based on the MRFTA with other policies. In so far as competition policy provides the most fundamental framework for market order and also contains elements of general industrial policy, other industrial laws such as the Industrial Development Act, the Copyright Act, and the Patent Act must be recast and enforced within the boundary set by the MRFTA. Currently, activities "justifiable" under such laws are exempted from the MRFTA. In a similar vein, external trade policy must be harmonized with internal competition policy. An attempt to segregate the two policies will be futile in the open economy. Similarly, on the international front, competition policies of different countries must be coordinated to apply, as far as possible, uniform rules and to promote exchanges of information on the market conduct of firms across countries. Such cooperation becomes more important as more firms, multinationals in particular, expand their business activities on a global scale.

V. THE NEW AGENDA FOR THE GATT/WTO

58. The Uruguay Round trade negotiations have been concluded, and the agenda for the next round of the world trading body is being formulated. It is widely expected that issues of competition, the environment, and possibly labour will be on the agenda. Some specific issues that need to be addressed in the next round will be proposed here along with a modest proposal for forging links between competition and trade in the context of our world trading system.

59. Nations have antidumping laws that prohibit imports sold at less than the home country price or otherwise less than the "fair value", where the imports materially injure a domestic industry. Antidumping laws create international tensions. An exporting country's competitively priced goods are taxed on entry into the importing country, and exporting firms believe that they have been denied fair market access. Antidumping laws also cause internal tensions with competition policy. Competition policy encourages sustainable low pricing as long as it is not "predatory", whereas antidumping law counters such low pricing in order to protect a domestic industry.

60. Much of the discussion on the conflict between competition policy and trade policy has focused on the antidumping system, whose anti-competitive effects have been well documented. The use of "undertakings" by exporters to raise prices effectively amounts to collusion between domestic producers and exporters to fix prices. Without the cover of antidumping proceedings, price fixing resulting from "undertakings" would be a clear violation of competition rules. Whereas it is generally agreed that pricing below average variable cost is predatory and therefore eligible for action under competition policy, exceptions are allowed under the antidumping system for price discrimination that does not meet the variable cost test, and a margin of dumping may be arbitrarily created.

61. A number of experts have argued that the anitidumping system should itself be dumped and replaced by antitrust provisions against predatory pricing. Others have argued for a reform of the antidumping system to bring it more in line with competition policy, particularly with regard to the calculation of the margins of price difference and the concept of injury to producers. However, a nation that views the right to impose antidumping duties as a valuable bargaining chip can hardly be expected to reconcile the

tension between its competition policy and its antidumping laws. Other than in the European Union, where imposing antidumping duties is a violation of the Treaty of Rome, internal reconciliation of these tensions is rare. Antidumping laws remain intact even within NAFTA. 8/

62. What needs to be achieved in the next round is the integration of competition policy considerations into the workings of trade law remedies or the contingent protection system of GATT Articles VI and XIX. Considerable attention should be paid to the issue of antitrust/antidumping tensions. In addition, the possibility of replacing the antidumping regime with a carefully circumscribed extension of national competition policy provisions and jurisdiction should be explored. It is misleading to argue that competition law is not an adequate substitute for antidumping law owing to differences in the antitrust provisions on price discrimination across nations. Lack of harmonization in substantive law and in procedures should not be a major issue.

63. We should now look at the specific problems that could arise in bringing competition policy into a working relationship with trade policy with regard to contingent protection measures, and engage in studies directed at the issue of replacing antidumping procedures with existing antitrust procedures in the post-Uruguay Round period. There may be several ways to integrate competition policy considerations into the application of GATT Articles VI and XIX measures. One is to take into account the competitive structure of the domestic market when considering the granting of special, or "contingent", protection under the antidumping, anti-subsidy, or safeguard provisions. Producers who dominate domestic markets may be denied such special protection. UNCTAD and other international organizations may significantly contribute to the harmonization of antidumping systems with competition rules by providing a forum where detailed examinations of the issue can be carried out.

64. Every nation has some form of state-action and act-of-state doctrines, exempting government actions from antitrust provisions. Some anticompetitive state actions are subject to GATT; others are not. State actions may be in the form of subsidies, authorization of export cartels, standard-setting, or conferring of competitive advantages on nationals. A widely cited, more generic case is government authorization of export cartels, whereby a nation, though it prohibits cartels at home, decides to profit by exploiting foreign markets.

65. Nations in search of principles for advancing competition for their mutual benefit could agree to refrain from government actions designed to exploit each other or to disadvantage foreigners. Exploitative and discriminatory state actions, and combined state/private actions, are major items for the agenda.

66. Extraterritorial enforcement of United States antitrust law, encompassing a broad range of discovery rights, private enforcement, class actions, treble damage remedies, and criminal punishment, has been a source of international tension, triggering the enactment of statutes designed to block United States discovery and "claw back" the two-thirds (penal) portion of foreign (United States antitrust) judgements. Extraterritorial antitrust enforcement

is based on some form of the effects doctrine: actions extending across the globe may directly harm competition in other nations in a globalizing world economy, and the injured nation needs to protect itself.

67. The rationale for antitrust enforcement against foreign firms cannot be entirely denied, particularly in the case of illegal private cartels targeted at nationals or the markets of the regulating nation. However, many cases do not seem to fit into this category. Some cartel actions are government-authorized, and some private actions are regulated and allegedly legal in the home country. Moreover, certain actions allegedly by a cartel, may not actually be by a cartel. In such cases, extraterritorial enforcement initiatives may cause tension between nations, with charges of "unilateralism" and intrusion into sovereignty. The problem of jurisdictional outreach does therefore give rise to items for the agenda, and those items should include fairness and legitimacy of process as well as choice of law.

68. Non-enforcement of competition law in the context of the closed foreign market problem gives rise to international tensions. Indeed, the perception of foreign market closure is one of the most serious competition/trade problems today. The problem became prominent in the course of the United States-Japan Structural Impediments Initiatives, launched in 1989. The United States announced its intention to use antitrust law to pry open foreign markets that were closed, e.g. by domestic suppliers boycotting foreign goods. United States officials stated that if the host country refused to enforce its antitrust laws and thereby restrain its nationals from purchasing United States imports, and if comity conditions could be met, the United States would be likely to bring suit under United States law.

69. The absence of recourse to a trusted and impartial decision-maker may be at the heart of tensions in the context of the closed foreign market problem. Thus, dispute resolution and its legitimacy and acceptability needs to be included on the agenda.

70. The issues of market access and presence have become central concerns of trade policy-makers at both the national and international levels. The heightened complementarity between trade, investment, and collaborative agreements in global business, as well as the success in liberalizing trade and investment unilaterally, regionally, and multilaterally have made apparent the interlinkages between trade, investment and other domestic policies, as well as the importance of private conduct and market structures for international economic relations.

71. Of notable concern is the fact that the multilateral route has often been bypassed as countries have increasingly turned to unilateral and bilateral approaches. The issue of objectively assessing the degree of openness of a market and measuring progress in liberalizing conditions of access and presence has proved particularly intractable.

72. In general, unimpaired market access refers to conditions of competition which provide foreign goods, services, service providers, and investors opportunities to compete in a market on terms equal or comparable to those enjoyed by locally produced goods and services and locally established firms. However, it will be difficult to define and give substance to the notion of conditions of competition which ensure unimpaired market access. An avenue

possibly worth pursuing is that of establishing an illustrative list of measures and practices deemed to impair market access. In addition, the relative importance of various market access issues in the post-Uruguay Round trade agenda needs to be assessed so as to determine the best means of addressing them.

73. Institutional and policy-making responses have so far been less than thorough, and have tended to be predicated on the assumptions of a world economy characterized by shallow forms of integration. It seems particularly important and timely to explore these issues and their complex interrelationships further so as to lay the foundations for future multilateral discussions and legislation. UNCTAD is well suited to contribute actively to this effort, providing analytical support to deepen the understanding of substantive issues, and to debate and develop responses for policy-making and legislating. Such contributions could also expedite possible future work in the WTO and other international forums.

Notes

1/ The Act had the two stated objectives of price control and assurance of fair trade practices, but the actual implementation was focused on price control and prohibition of hoarding and cornering of staple food products.

2/ The clause on conscious parallelism was later deleted by the 1986 amendment, as it was believed to lack any theoretical justification.

3/ The jaebol refers to the conglomerate business groups, the majority of whose component firms are monopolistic or oligopolistic in their respective markets, essentially owned and controlled by specific individuals or their family members.

4/ A unique feature of the MRFTA is that the establishment of new companies is treated as a method of business integration. This is in response to the fact that more firms are newly established than merged in the rapidly growing Korean economy. Of a total of 2,306 business integrations reported up to 1992, 610 (26.4 per cent) were through the establishment of new companies.

5/ In 1987, Japan did not contest any of the 1,147 mergers notified to its Fair Trade Commission. In the United States, 14 of the 2,256 mergers notified to the antitrust agencies during 1987 resulted in injunctive action. In Germany, where merger control is relatively strict, 76 mergers have been prohibited and 143 amended or abandoned since merger control began in 1973. See R.A. Boner and R. Krueger, The Basics of Antitrust Policy: A Review of Ten Nations and the European Communities, World Bank Technical Paper No. 160, 1991, n. 166.

6/ N. David Palmeter, "The Antidumping Law: A Legal and Administrative Nontariff Barrier" in R. Boltuck and R.E. Litan (eds.): Down in the Dumps/Administration of the Unfair Trade Laws, Washington, D.C. The Brookings Institute, 1991, at p. 87. "Raise the *de minimis* level of 0.5 per cent to 5 per cent. The current *de minimis* standard, 0.5 per cent, pretends to a precision that is rarely achieved in antidumping investigations, and, if

achieved, is reached only at enormous cost. A 5 per cent standard has the virtue of being consistent with the exchange rate regulations of the department [of Commerce], which require conversion of all currencies involved in an antidumping investigation into United States dollars ... . It is obvious that there is enough play in this exchange rate policy alone to make the 0.5 per cent *de minimis* standard meaningless."

7/ J.F. François, N.D. Palmeter, and J.C. Anspacher, "Conceptual and Procedural Biases in the Administration of the Countervailing Duty Law", in Boltuck and Litan (eds.) op. cit. pp. 131-132: "Apply a 5 per cent *de minimis* standard for domestic subsidies. Domestic subsidy programs do not have the same effect on export performance as export subsidies at identical prices. In addition, a domestic subsidy programme can be used as legitimate policy tools and are recognized explicitly as such in the GATT Subsidies Code. Even if the Department [of Commerce] continues with its current cash-flow approach to the determination of subsidy rates, a higher *de minimis* standard for domestic subsidies would be a simple way to recognize the distinction between export and domestic subsidies that is drawn in the GATT Subsidies Code."

8/ The Australian-New Zealand Closer Economic Relations Trade Agreement provides a separate Protocol for full cooperation in enforcement by achieving the harmonization of rules governing abuse of dominant positions while abolishing antidumping actions.